No. 10-334

Supreme Court, U.S.
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In The

Supreme Court of the United States

CATHERINE ROBERSON,

Petitioner,

v.

ERIC K. SHINSEKI,
Secretary of Veterans Affairs,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF

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ARGUMENT

The Federal Circuit's decision reads a fault standard into former 38 U.S.C. §1151 despite *Gardner*, which held that without some mention of fault in that statute, it would be unreasonable to read a fault requirement into it. *Brown v. Gardner*, 513 U.S. 115, 115 S.Ct. 552, 556, 130 L.Ed.2d 462 (1994).

The government contends that further review is not warranted because the decision below has limited prospective significance; and, that in any event, there is no conflict between *Gardner* and the decision below.

A. The government's limited prospective significance argument is unsupported by the facts or the law.

The government implies that Petitioner Roberson's case is so extraordinarily unusual that it does not warrant the expenditure of the Court's time to review the decision below. The government reasons that, effective October 1, 1997, Congress amended 38 U.S.C. §1151 to insert a fault standard. Therefore, the government states, the decision below will apply "only to the narrow class of pending cases filed before October 1, 1997." Opp. 12-13.

That statement is without support in the facts or the law.

1. The government's assertion that the decision below applies only to "pending cases filed before October 1, 1997" is incorrect as a matter of law.

The decision below affects all VA claimants whose claims were filed before October 1, 1997 and subsequently denied because VA wrongly imposed a fault requirement. This is so, even though the claim is no longer pending because the wrongly denied VA claimant, unlike Petitioner Roberson, did not persist in years of appeals.

The decision below has much broader effect than the government acknowledges because Congress provided a statutory remedy to VA claimants whose claims are the subject of a final wrongful denial: revision of the wrongfully denied claim on grounds of clear and unmistakable error ("CUE").

The CUE remedy of revision of final decisions of the VA Regional Office (the initial adjudicatory body within the VA administrative claims system) was initially authorized by the Secretary's regulations; it was codified in 1997, at 38 U.S.C. §5109A.

At the same time, at 38 U.S.C. §7111, Congress extended the CUE remedy to claimants whose cases were the subjects of final decisions by the VA's Board of Veterans' Appeals (which provides final administrative review of Regional Office decisions appealed by the claimant).

"Clear and unmistakable error" is not defined by statute; but, it is well settled in the case law that one prong of the CUE test is whether "the statutory or regulatory provisions extant at the time were incorrectly applied." *Russell v. Principi*, 3 Vet. App. 310, 313 (1992) (en banc), frequently cited for support since then by both the U.S. Court of Appeals for Veterans Claims ("CAVC") and the Federal Circuit, including recently in *Willsey v. Peake*, 535 F.3d 1368, 1371 (Fed. Cir. 2008).

Accordingly, the Federal Circuit's decision below affects all VA claimants whose claims were filed under former Section 1151 and then denied because the agency reimposed a fault standard under former Section 1151, including claims that are no longer pending.

2. The government's suggestion that there is an insignificant number of claims filed before October 1, 1997 and still pending is unsupported by the facts.

The government implies that, due to the passage of time since October 1, 1997, few if any claims filed under the former Section 1151 remain pending. Opp. 12-13.

The government offers no facts to support this notion or to support the notion that Petitioner Roberson's 14-year-old claim is an anomaly in the VA claims adjudication system. To the contrary, VA claimants whose claims are not granted upon initial application face years and years of adjudicatory delay.

> The VA disability compensation bureaucracy remains difficult to navigate, slow, and inaccurate, all of which leads to incorrect medical benefits and disability compensation. Cases demonstrating the glacial pace of the VA in determining benefits, the difficulty of navigating the bureaucracy, and VA blunders in general are legion.

Benjamin W. Wright, *The Potential Repercussions of Denying Disabled Veterans the Freedom to Hire an Attorney*, 19 Federal Circuit Bar Journal 433, 433-434 (2009). Mr. Wright calculated that from the date the claim is first filed until the VA Regional Office makes an initial decision generally takes 179 days. If the veteran disagrees with the decision and requests review by a Decision Review Office at the Regional Office level, that process takes on average 645 days. If the veteran remains dissatisfied and appeals to the Board of Veterans' Appeal, it takes on average 1,215 days before a BVA decision is reached, for a total of 2,039 days – over 5½ years. *Id.*

The Board's statistics appear more favorable, totalling 1,082 days on average until the Board's decision is issued, but the Board's statistics omit the time from the date of filing the claim and the initial Regional Office decision, and omit the time required

for review of the initial denial by a Regional Office Decision Review Officer.[1]

If the Board of Veterans' Appeals concludes that additional development is required and remands to the Regional Office, the average remand time is 535 days. *Id.*

If the Board denies the appeal, the veteran has 120 days to file a notice of appeal to the CAVC. The average time from filing until disposition has ranged from 326 days (in 2002) to 446 days (in 2008).[2]

That is not the end of the delay.

Based on statistics maintained by the CAVC, only 32% of the cases appealed from the Board to the Court were affirmed in 1999. In 2008, the affirmance rate dropped to just 20%. The other cases were either remanded or reversed because of VA error.[3]

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[1] *See* Board of Veterans' Appeals Report of the Chairman, Fiscal Year 2009, http://www.bva.va.gov/Chairman_Annual_Rpts.asp.

[2] *See* CAVC Annual Report, http://www.uscourts.CAV.gov/annual_report/.

[3] This calculation is based on the total merits decisions reported by the CAVC, minus the number of decisions on petitions for extraordinary relief; then, that subtotal is divided by the cases in which the CAVC affirmed the Board and provided no relief to the claimant. The data is found in the CAVC's Annual Reports, cited in footnote # 2.

On remand from the CAVC to the Board, the Board may make a new decision on the merits; or, it may further remand to the Regional Office. The Regional Office may grant the claim or continue to deny it and return the claim to the Board for further review. If the Board continues to deny the claim, then the claimant may appeal again to the CAVC.

Petitioner's counsel is not aware of statistics which track the number of cases which are appealed to the Court two, three or even more times because of ongoing agency errors.[4] However, the fact of repeated remands is well known to the CAVC, and disparagingly described, even by its judges, as "the hamster wheel." *See, e.g., Stallworth v. Nicholson*, 20 Vet. App. 482, 491 (2006) (Lantz, J., dissent as to the remedy of remand, urging reversal):

> The unjustified remand in this case not only "perpetuates the hamster-wheel reputation of veterans law," *Coburn v. Nicholson*, 19 Vet. App. 427, 434 (2006) (Lance, J., dissenting),

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[4] Petitioner Roberson's case has been the subject of three BVA decisions, in November 1998, August 2004, and November 2005. It has been the subject of three CAVC decisions, in Docket Nos. 99-352, 04-2107 and 05-3243. The first two CAVC decisions remanded her claim to the agency; the final denied her appeal on the basis that she did not meet former Section 1151's requirements, which the CAVC construed to include a fault requirement. That decision was appealed to the Federal Circuit, whose decision is the subject of this petition.

> but also risks depriving the appellant of the benefit he should be awarded based on the factual finding already made by the Board.

Accordingly, the suggestion that it is extraordinarily unusual that a claim filed before October 1, 1997 is still pending is at odds with the well documented fact of years upon years of delay in the VA claims adjudication system.

B. The government's assertion that *Gardner* does not control because it involved an affirmative act of "commission" whereas Petitioner Roberson's case involved an act of "omission" is an incorrect statement.

The government argues that *Gardner* involved "an affirmative act of commission by VA, and the rule the Court announced cannot mechanically be applied to suits, like this one, in which the claimant alleges an act of omission such as a failure to diagnose." Opp. 9.

However, *Gardner* does not disclose whether the VA medical care which allegedly caused the injury was an act of commission or omission. It simply recites that Mr. Gardner had surgery for a herniated disc, after which he had pain and weakness in his left calf, ankle and foot. *Gardner, supra*, 115 S.Ct. at 554. These facts do not disclose whether Mr. Gardner's residual injuries were caused by an affirmative act of commission; or, by an omission, such as a misdiagnosis, or withholding of a particular pre-surgery

or post-surgery protocol, or non-performance of a particular technique during surgery.

The Court's analysis in *Gardner* does not refer to acts of commission vs. omission, nor does the former or current Section 1151 language make these distinctions.

C. The government's argument that VA medical care should not be singled out as the cause of injury since the veteran was also evaluated by private medical providers is irrelevant to the question of whether former Section 1151 contains a fault requirement.

The government argues that private physicians examined or treated Petitioner Roberson's late husband during the relevant time period and they also failed to diagnose his cancer. So, the government concludes, absent a showing of fault on the part of his VA medical care providers, "there is no basis for singling out the VA as the cause of any subsequent injury." Opp. 11.

The government cites no statutory language or case law authority to support this unusual analysis. Further, it is internally inconsistent. If the potential joint liability of both VA and non-VA medical care providers gives rise to a fault requirement, then logically it requires a fault requirement in joint liability cases involving acts of commission, too. Yet even the government now concedes that former section

1151 does not include a fault requirement in "commission" cases.

D. Contrary to the government's argument, the petitioner does not assert that "other methods" exist to prove causation.

The government states that the petitioner asserts that "other methods" exist to prove causation in failure to diagnose or treat cases. Opp. 11, citing to petitioner's brief at page 12. This is an inaccurate summary of petitioner's position.

The "other methods" language does not refer to alternate ways to prove causation. It refers to ways to narrow the class of compensable cases. Thus, the petitioner contends at page 12 of her petition that VA cannot narrow the class of compensable cases by inserting a fault standard, quoting *Gardner's* language that, " . . . such narrowing occurs by eliminating remote consequences, not by requiring a demonstration of fault." *Gardner, supra*, 115 S.Ct. at 556. *Gardner's* remote consequences method is consistent with VA's own regulations at 38 C.F.R. §3.358(c) (1990), cited at page 13 of the petition.[5]

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[5] The government states that the petitioner cited former 38 C.F.R. §3.347(c)(1), (2) (1990), but that the quoted language is from the current version of 38 C.F.R. §3.358(c). Opp. 12, footnote 2. Petitioner responds that the quoted language is found in both the 1990 version as well as the current version of Section 3.358(c). Counsel regrets the scrivener's error in referring to

(Continued on following page)

E. The government's assertion that further review is not warranted because alternative grounds support the decision relies upon an incorrect legal premise.

The government argues that even if former Section 1151 does not contain a fault standard, the Board of Veterans' Appeals made a finding of fact that no evidence supported that the lack of a cancer diagnosis had the effect of hastening the veteran's death. Because the Federal Circuit does not have jurisdiction to review a challenge to a factual determination, the government concludes that this alternate ground supports the Federal Circuit's decision.

This analysis is not well taken on several fronts. As a matter of law, VA claimants do not appeal directly from the Board of Veterans' Appeals to the Federal Circuit. They must first appeal from the Board to the CAVC. Review of BVA fact finding is within the CAVC's scope of review. *See*, 38 U.S.C. §7261(a)(4):

> In any action brought under this chapter, the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall --
>
> * * *

Section 3.357 and notes that the following paragraph at page 13 of the petition correctly identifies Section 3.358.

> (4) in the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, hold unlawful and set aside or reverse such finding if the finding is clearly erroneous.").

Thus, the CAVC, not the Federal Circuit, is specifically authorized to review BVA fact finding. Additionally, the CAVC is charged with mixed questions of law and fact, such as whether the Board properly applied the 38 U.S.C. §5107(b) benefit of the doubt standard in its fact finding (38 U.S.C. §7261(b)(1), requiring the CAVC to take due account of the Secretary's application of the benefit of the doubt standard); and, whether the VA complied with its 38 U.S.C. §5103A(a) statutory duty to assist by obtaining an adequate medical opinion (38 U.S.C. §7261(a)(2), requiring the CAVC to compel action of the Secretary unlawfully withheld or unreasonably delayed, and 38 U.S.C. §7261(a)(3), requiring the CAVC to set aside BVA decisions which are not in accordance with law) .

Those issues were not evaluated in Petitioner Roberson's case in light of the correct no-fault legal standard because the CAVC, affirmed by the Federal Circuit, held that former Section 1151 required Petitioner Roberson to prove VA negligence.

The government's contention that the Board's findings of fact are not subject to review, and that those findings provide an alternate basis to support the Federal Circuit's decision, is not a correct statement of law for the reasons stated above.

F. Summary reversal is appropriate in this case.

The decision below relies upon the creation of two discrete categories of Section 1151 claims based on VA medical care: one based on an affirmative act of commission, and the other based on an act of omission. There is no statutory language to support the government's commission/omission analysis, nor does *Gardner* support it.

Even if those two categories could be read into the statutory language, the government does not cite to any rules of statutory construction that would permit interpreting the identical statutory language to require a no-fault standard in cases of commission, but to require a fault standard in cases of omission. "Without some mention of fault, it would be unreasonable to read the text of §1151 as imposing a burden of demonstrating it upon seeking compensation for further disability." *Gardner, supra*, 115 S.Ct. at 556.

The decision of the lower court is wrong. That decision's reinsertion of a fault standard into former Section 1151 so departs from that statute's settled interpretation as announced by *Gardner* that it calls for this Court's exercise of its powers of supervision.

Petitioner Roberson respectfully requests that the Court consider summary reversal.

CONCLUSION

The petition for a writ of certiorari should be granted, and an order of summary reversal entered.

Respectfully submitted,

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